No. 21-418

In the Supreme Court of the United States

JOSEPH A. KENNEDY, PETITIONER

v.

BREMERTON SCHOOL DISTRICT, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMERICA FIRST LEGAL AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The Establishment Clause rulings of this Court led the Bremerton School District to conclude that it would violate the Constitution and face lawsuits unless it prohibited Coach Joseph Kennedy from praying quietly at midfield after football games. When Coach Kennedy refused to comply with the school district's edicts and continued praying after games, he lost his job. The Ninth Circuit held that the Establishment Clause (as interpreted by this Court) compelled the school district to stop Kennedy from praying on the field after games, and it rejected Kennedy's Speech Clause and Free Exercise claims by claiming that the school district's actions were necessary to prevent an Establishment Clause violation.

The questions presented are:

1. Should this Court overrule the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and other its other Establishment Clause rulings that enabled the Ninth Circuit to find that a coach's decision to pray quietly at midfield after a football game is somehow an "establishment" of religion?

2. Did the school district violate the Free Exercise Clause by demanding that Kennedy cease his post-game prayers when it did not do so pursuant to a neutral, generally applicable rule?

3. Did the school district violate the Speech Clause by demanding that Kennedy halt his post-game prayers?

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INTEREST OF AMICUS CURIAE[1]

America First Legal Foundation is a nonprofit organization dedicated to promoting the rule of law in the United States and defending individual rights guaranteed under the Constitution. America First Legal has a substantial interest in this case because this Court's repeated misinterpretations of the Establishment Clause have been threatening the rights of religious believers in this country for decades. It urges this Court to reconsider and

1. All parties have consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the amicus curiae, its members, or its counsel financed the preparation or submission of this brief.

overrule the Establishment Clause decisions that caused Coach Kennedy to lose his job for nothing more than praying silently at midfield after a football game.

SUMMARY OF ARGUMENT

The spectacle of a Christian losing his job for praying at midfield after a football game is something to be expected in a Communist dictatorship or a theocracy ruled by Islamic clerics. It is intolerable that this would occur in a nation whose Constitution (supposedly) guarantees the right of religious worship. The petitioner's brief places the blame for this disgraceful episode on the school officials and the Ninth Circuit judges who thought that Kennedy's behavior violated the Establishment Clause. But these are not the individuals who should be blamed for what happened. The fault lies squarely with this Court—or, to be more precise, with the members of this Court who have propagated and perpetuated a separationist narrative that flatly contradicts the text and original meaning of the Establishment Clause, and that has enabled courts and litigants to use the Establishment Clause as a weapon against religious believers.

The petitioner's brief is content to accept the past Establishment Clause pronouncements of this Court, and it does not ask the Court to reconsider or overrule the decisions that led the school district and the Ninth Circuit panel to conclude Kennedy was violating the Establishment Clause. Instead, the petitioner's brief complains that the school district and the Ninth Circuit misinterpreted this Court's past decisions and offers a path for distinguishing rulings such as *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). Pet. Br. at 35–47. That

is a sound litigation strategy, because it always easier to win a case by showing that the desired outcome is compatible with existing precedent rather than demanding the overruling of past decisions. But it would be a grave mistake for this Court to assume or reaffirm the legitimacy of its prior Establishment Clause pronouncements. And it would be equally misguided to issue a narrow ruling on the Establishment Clause that leaves Coach Kennedy (and other public employees) unaware of whether they can pray in circumstances that depart in any way from the precise fact pattern of this case. *See, e.g.*, *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2017). The Court's Establishment Clause jurisprudence should be torn up root and branch because it flouts the Constitution's text, leads to persecution of religious believers, and forces school administrators into hopeless dilemmas in which they must choose between exposing themselves to Establishment Clause lawsuits or exposing themselves to Speech Clause or Free Exercise claims. If the Court is not yet ready to take that step, it should use this case to begin laying the groundwork for the eventual repudiation of its Establishment Clause jurisprudence.

Once the Establishment Clause objections are dispatched, the case becomes an easy win for Coach Kennedy under the Free Exercise Clause. The school district and lower courts acknowledged (as they must) that the anti-prayer edicts were not "neutral and generally applicable" because they specifically targeted Kennedy's post-game prayers. Pet. App. 23; Pet. App. 160. So the school district must meet the demanding test of *Sherbert v. Verner*, 374

U.S. 398 (1963), and show that its anti-prayer policy is the least restrictive means of advancing a compelling state interest. *See id.* at 406; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (strict scrutiny applies to laws or policies that "restrict practices because of their religious motivation"). There is no conceivable state interest in stopping a coach from praying on the field after a football game—let alone a state interest that qualifies as "compelling." Coach Kennedy was not preaching to captive audiences or coercing students to join his post-game prayers, and the prospect that Kennedy's prayers might offend onlookers who dislike public displays of religion does not justify a government-imposed prohibition on religious expression.

The Speech Clause claim presents a closer question, because public employers are allowed to regulate the speech of their employees that occurs on company time. *See Garcetti v. Ceballos*, 547 U.S. 410 (2006). And it is easy to imagine hypotheticals in which a school district would be justified in restricting a coach's post-game speech activities. Suppose that Coach Kennedy, instead of being a devout Christian who knelt in prayer, were a homosexual activist who ran to midfield after each game to unfurl a rainbow flag? Surely a school district can restrict its employees from engaging in that type of activity on school property, so long as they do so pursuant to viewpoint-neutral policies. More importantly, a public-school football coach remains under the control and discipline of his employer while milling about on the field after a game. A coach that uses profanity in his post-game speeches or refuses to shake hands with the opposing coach after the

game can be disciplined by his school district, and any attempt to invoke the Speech Clause as a shield for this behavior should be swiftly dispatched under *Garcetti*. The Free Exercise Clause is enough to resolve this case in Kennedy's favor, and the Court should avoid wading into the dicier questions surrounding the Speech Clause and the extent to which it limits a school district's ability to control the post-game speech activities of its coaches or employees.

ARGUMENT

The petitioner's brief begins by discussing the Speech Clause and Free Exercise Clause issues—and it addresses the Establishment Clause only after concluding that the school district violated Kennedy's First Amendment rights. Pet. Br. at 35–47. That puts the cart before the horse. The lower courts' rejection of Kennedy's First Amendment claims were premised on their belief that the Establishment Clause prohibited Kennedy from praying on the field after football games. Pet. App. 24; Pet. App. 160. And one cannot assess Kennedy's Speech Clause and Free Exercise Clause claims without first determining whether his post-game prayers violated the Establishment Clause, as there is no constitutional right to engage in speech that violates the Establishment Clause—nor is there any constitutional right to exercise one's religion in a manner that causes the Establishment Clause to be violated. *See Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 394–95 (1993).

I. THE COURT SHOULD DIS-INCORPORATE THE ESTABLISHMENT CLAUSE, REJECT SEPARATIONISM, AND OVERRULE LEMON V. KURTZMAN

For the past 75 years, this Court has interpreted the Establishment Clause in a manner that flouts the constitutional language and imposes a separationist ideology that has no grounding in the Constitution's text or history. *See* Philip Hamburger, *Separation of Church and State* (2002). Recent decisions of this Court have backed away somewhat from the separationist rhetoric of the 1960s and 1970s, as well as the disastrous "*Lemon* test," which the Court used to treat as something akin to holy writ. *See American Legion v. American Humanist Ass'n*, 139 S. Ct. 2067, 2080 (2019) ("In many cases, this Court has either expressly declined to apply the [*Lemon*] test or has simply ignored it."). But this Court has never formally repudiated any of its prior Establishment Clause pronouncements, leaving them available for litigants (or would-be litigants) to use against school officials that fail to suppress every expression of religious belief that occurs in school-related activities. The Court, for example, has never disowned its claim that the Establishment Clause outlaws anything that a reasonable observer would perceive as an "endorsement" of religion—a stance that would prohibit "under God" in the pledge of allegiance and eliminate "In God We Trust" as the nation's official motto. *See County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 592 (1989) ("We have paid particularly close attention to whether the challenged governmental practice either

has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence."). Nor has it overruled the *Lemon* test, which requires courts to enjoin state-sponsored conduct whose "principal or primary effect . . . advances . . . religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). So it is entirely understandable that school officials would be concerned that their willingness to permit even the most benign displays of religious sentiment by school employees will subject the school district (and its taxpayers) to Establishment Clause lawsuits. One can hardly blame the school officials for acting as they did, even though the petitioner's brief is right to point out that this Court's Establishment Clause precedents need not be read to prohibit Kennedy's post-game prayers. Pet. Br. at 35–47.

As it happens, the school district bought itself a lawsuit from the opposite direction—bringing itself out of the Establishment Clause frying pan and into the Free Exercise fire. But the school district never should have been put in this situation to begin with. The *only* reason that the school district ordered Kennedy to stop praying after football games was because it feared that his conduct "might" violate this Court's Establishment Clause pronouncements and subject the school district to lawsuits.[2] And that fear was entirely justified given this

2. In its letter to the EEOC, the school district wrote: "The District's course of action in this matter has been driven *solely* by concern that [Kennedy's] conduct might violate the constitutional rights of students and other community members, thereby subjecting the District to significant potential liability." J.A. 138 (emphasis added); *see also* Pet. App. 140 ("[T]he risk of constitutional

Court's failure to disavow the separationist rhetoric in its previous opinions or the *Lemon*-inspired "endorsement" test.

The Court should recognize that its Establishment Clause decisions were causing school officials to persecute Coach Kennedy—and that these cases are causing religious believers in other school districts to face similar threats from school administrators who are understandably concerned about the possibility of Establishment Clause litigation if they tolerate or allow any type of religious expression by school employees. And the Court should take decisive action to redress this problem. A narrow ruling on behalf of Coach Kennedy is no help to school employees throughout the country who wish to pray or express their faith in situations that might be distinguishable from the facts of this case, and Coach Kennedy himself could find himself in jeopardy again if students voluntarily join his post-game prayers (as they did before the school district nixed the practice in September 2015). The Court should take bold action to rein in the abuses of its Establishment Clause jurisprudence and repudiate the lawlessness of its prior pronouncements.

A. The Court Should Dis-Incorporate The Establishment Clause

The text of the Establishment Clause and the Fourteenth Amendment are incompatible with a regime that "incorporates" the Establishment Clause against state

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liability associated with Kennedy's religious conduct was the 'sole reason' the District ultimately suspended him"); J.A. 50; J.A. 56.

governments. The text of the Establishment Clause provides:

> Congress shall make no law *respecting* an establishment of religion . . .

U.S. Const. amend. I (emphasis added). It does not say that "Congress shall make no law *establishing* a religion." It prohibits Congress from making laws "respecting" an establishment of religion—which means that it prohibits Congress from enacting laws that establish *or dis-establish* churches in the states. *See Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 50 (2004) (Thomas, J., concurring in the judgment) ("[T]he Establishment Clause . . . protects state establishments from federal interference"); Akhil Reed Amar, *The Bill of Rights* 32 (1998) ("Its mandate that Congress shall make no law '*respecting* an establishment of religion' also prohibited the national legislature from interfering with, or trying to *dis*-establish, churches established by state and local governments"); *id.* at 324 n.62 (citing authorities). The Court's Establishment Clause rulings consistently ignore this textual point, and pretend as though the language prohibits only laws that "establish" a religion. But courts cannot read words out of the Constitution, any more than they can ignore words in a statute. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect"); *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020) ("Only the written word is the law, and all persons are entitled to its benefit.").

It is hard to see how a constitutional provision that *protects* the states' prerogatives to decide whether to have

an established religion can be "incorporated" to *restrict* state power. *See Newdow*, 542 U.S. at 49–52 (Thomas, J., concurring in the judgment); Amar, *supra* at 41 ("As a more pure federalism provision, then the establishment clause seems considerably more difficult to incorporate against the states."). And it is even harder to see how the Establishment Clause can be incorporated given the text of the Fourteenth Amendment. Incorporation through the Due Process Clause can be triggered only when someone is deprived of "life," "liberty," or "property,"[3] but no one is deprived of their "life," "liberty," or "property" when Coach Kennedy prays after a football game or when a state official appears to "endorse" a particular religion. And privileges-or-immunities incorporation requires the identification of a "privilege" or "immunity" enjoyed by "citizens of the United States."[4] Yet there is no "privilege" or "immunity" to be free from an established church when the First Amendment *protects* the rights of states to preserve their established churches. *See* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1270–72 (1992) (explaining how the Establishment Clause must be excluded from theories of incorporation that rest on the privileges-or-immunities clause).

Dis-incorporating the Establishment Clause would remove incentives for school officials to suppress religious speech and expression, as school districts would need only

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3. U.S. Const. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law").
4. U.S. Const. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States").

to fear free-speech or free-exercise lawsuits from the students or employees that they censor. It would also align the Court's jurisprudence with what the Constitution actually says rather than the atextual concoctions of previous courts. *See Graves v. New York*, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring) ("[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."). The Court should overrule its decision to incorporate the Establishment Clause, and it should eliminate the Establishment Clause constraints that it has wrongly imposed on the states and school officials.

B. If The Court Is Unwilling To Dis-incorporate The Establishment Clause, It Should At Least Overrule Separationist Decisions Such As *Lemon v. Kurtzman*

If the Court is not prepared to reject incorporation of the Establishment Clause, it should at least repudiate the separationist rhetoric and court rulings that cause school officials to fear lawsuits whenever a school employee engages in religious expression. The chief culprit is the three-part test that this Court invented in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which has been widely and repeatedly criticized by members of this Court but has never been formally overruled. *See American Legion v. American Humanist Ass'n*, 139 S. Ct. 2067, 2080 (2019) (sharply criticizing the *Lemon* test but stopping short of overruling it); *Lamb's Chapel v. Center Moriches School District*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment) (analogizing the *Lemon* test to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed

and buried"). The Court should finally overrule this so-called "test" and bury it once and for all. School administrators cannot know whether a court will apply the *Lemon* test if they get sued, because this Court (and lower courts) choose to apply or not to apply *Lemon* at whim. *See American Legion*, 139 S. Ct. at 2080 (listing the occasions in which this Court "has either expressly declined to apply the [*Lemon*] test or has simply ignored it."). And in the face of this uncertainty, school officials often choose heavy-handed tactics to eliminate the possibility of Establishment Clause lawsuits that rely on *Lemon*.

The Court should also repudiate the idea that a state or school district violates the Establishment Clause by engaging in conduct that "endorses" (or appears to endorse) religious belief. *See Books v. Elkhart County*, 401 F.3d 857, 869 (7th Cir. 2005) (Easterbrook, J., dissenting) ("'Endorsement' differs from 'establishment.' A government does not 'establish' milk as the national beverage when it endorses milk as part of a sound diet."). The text of the Establishment Clause does not prohibit the endorsement of religion, and (more importantly) the government and its officials endorse religion and theism all the time. Examples include: putting "In God We Trust" on our money, having schoolchildren recite the Pledge of Allegiance with "under God," and opening court sessions with "God save the United States and this honorable court." *See, e.g.*, *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being."). All of these unquestioned endorsements of religion are constitutionally allowed—yet the court-created "endorsement" test continues to exist. And by

allowing the Court's previous "endorsement" musings to survive, school officials and their lawyers must continue to worry about whether they will be sued for allowing a coach to kneel in prayer on a football field after a game.

II. THE SCHOOL DISTRICT ANTI-PRAYER EDICTS VIOLATED KENNEDY'S RIGHTS UNDER THE FREE EXERCISE CLAUSE

The petitioner's brief collapses the free-exercise and free-speech arguments into a unified First Amendment claim,[5] but the Court's analysis of these claims should be kept distinct. The test for Kennedy's Free Exercise claim differs from the test for his Speech Clause claim. On the Free Exercise Clause, the school district concedes that its policy is not "neutral and generally applicable" because it specifically targets Kennedy's prayers,[6] so the strict-scrutiny standard applies. *See Fulton v. Philadelphia*, 141 S. Ct. 1868, 1881 (2021) (strict scrutiny when a law or policy burdening religious freedom is not "neutral and generally applicable"); *Church of Lukumi Babalu*, 508 U.S. at 533 (same). The school district court must therefore show that its anti-prayer policy is "narrowly tailored" to advance a "compelling interest." *Fulton*, 141 S. Ct. at 1881.

The only "interest" in suppressing Kennedy's prayers that has been suggested in this litigation is the need to avoid a supposed Establishment Clause violation. Pet. App. 24 ("Based on the Establishment Clause analysis in the fourth *Eng* factor above, the District's September 17 directive was thus motivated by a compelling state

5. Pet. Br. at 23–35.

6. App. 23; Pet. App. 160.

interest."); Pet. App. 160 ("The District had a compelling interest in avoiding constitutional violations . . . and the Court has already concluded that allowing Kennedy to continue praying at the 50-yard line would have violated the Establishment Clause."). But once this Court rejects the notion that Kennedy's post-game prayers violate the Establishment Clause, the school district and the lower courts are left with nothing on which to hang their hat. It is hard to fathom any other "interest"—apart from preventing violations of the Establishment Clause—that might justify the school district's actions. Praying silently on a football field after a game does not inflict harm on anyone. The worst thing that could be said about Kennedy's actions is that they might offend onlookers who oppose public displays of religious expression. But it would be preposterous to claim that the school district has a "compelling" interest in shielding offended onlookers from witnessing someone in prayer. The First Amendment does not give onlookers a Heckler's veto over speech or religious expression that offends them.

The Court should also rebuke Judge Smith for accusing Kennedy of "flout[ing]" the Sermon on the Mount. Pet. App. 69 ("I personally find it more than a little ironic that Kennedy's 'everybody watch me pray' staged public prayers (that spawned this multiyear litigation) so clearly flout the instructions found in the Sermon on the Mount on the appropriate way to pray."). It is not the role of federal judges to assess a litigant's conformity to the teachings of his faith, or to offer advisory opinions on the meaning of religious texts. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) ("[I]t is not for us to say that their

religious beliefs are mistaken or insubstantial."). No one in this case is questioning the sincerity of Coach Kennedy's religious convictions, and Judge Smith's only role is to determine whether the school district has violated Kennedy's rights under the First Amendment.

III. THE COURT NEED NOT RESOLVE THE SPEECH CLAUSE CLAIM

Kennedy's Speech Clause claim raises more complicated questions. Public employers are permitted to regulate the speech of their employees while they're on the job. *See Garcetti v. Ceballos*, 547 U.S. 410 (2006). And Coach Kennedy is still on the clock during the post-game activities. It is also far from clear that Kennedy was disciplined for his *speech*. He prayed quietly, so no one even heard what he said. And if Kennedy had uttered the same prayer with the same words in a manner that was unnoticeable, then the school district would not have acted against him at all. What the school district found objectionable was that Kennedy kneeled at midfield to pray in a manner that was visible to others. The mere fact that he prayed or the content of his prayers is not what triggered the school district's disciplinary actions. The Free Exercise Clause is a better fit for Kennedy's claim, and the Court can resolve this case on the Establishment and Free Exercise Clauses alone.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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